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Report To The Congress

OF THE UNITED STATES

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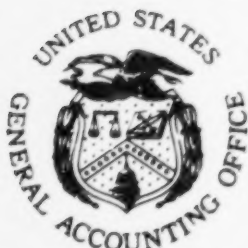
Changes Needed To Deter Violations Of Fair Labor Standards Act

The Fair Labor Standards Act, established to protect the wages of American workers, is not adequately accomplishing its objective. Employers who violate certain provisions of the act are not penalized either because penalties do not exist or because existing ones are not used as often as they should be.

The Department of Labor is also lax in recovering maximum back wages permitted by statute, and by not seeking interest. Labor does not restore, to the maximum extent, the full value of illegally withheld wages. When some illegally withheld back wages are not restored to employees, employers profit because the statute of limitation relieves them of this obligation.

This report contains recommendations to

- strengthen Labor's enforcement program to deter employers from violating the Fair Labor Standards Act and
- improve Labor's ability to recover the full amount of back wages illegally withheld from employees.



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D I G E S T

The Fair Labor Standards Act of 1938 sets standards for recordkeeping, minimum wage, overtime pay, and other protections for about 60 million workers in over 4.1 million establishments engaged in interstate and foreign commerce. Noncompliance with the act--particularly the minimum wage provisions--can severely harm low-wage workers by causing their income to be substantially below the poverty level. While the act does protect employee wages when employers voluntarily comply, there are insufficient deterrents to discourage employers from violating the act, and administrative and statutory limitations can prevent the Department of Labor from fully recovering wages illegally withheld. (See pp. 1, 8, 23, and 45.)

DETERRENTS INEFFECTIVE OR NONEXISTENT
TO DISCOURAGE RECORDKEEPING VIOLATIONS

For one of the most important requirements under the act--recordkeeping--there are no civil penalties and although criminal penalties exist for willful recordkeeping violations, they are not used. Adequate records are essential to determine whether employers are complying with the act and how much illegally withheld back wages are owed to employees.

Without these basic wage records, the intent of the act cannot be fully carried out. It is to an employer's advantage not to maintain adequate records so that violations cannot be identified and back wages cannot be accurately computed--thus, employers profit at the expense of their employees. (See p. 8.)

GAO found that recordkeeping violations are extensive and that they often hamper Labor's ability to document and recover the full amount of back wages owed to employees. Labor often settles cases for less than the estimated amounts due when employers who have violated recordkeeping provisions dispute the compliance officers'

back wage estimates. While a compliance officer's estimates may not accurately reflect the back wages actually owed employees when records are not available, employers often appeared to profit when settlement negotiations substantially reduced the amounts restored to employees. Labor officials agreed that difficulties proving the extent of violations, due to inadequate records, are major factors in Labor's decision not to take cases to trial, thus causing negotiated settlements for less than the full amount of back wages due. (See pp. 8 and 9.)

GAO believes penalties for violating recordkeeping provisions are essential and that Labor should be authorized to assess civil penalties. Because of the extensive time required to complete cases in many district courts, the low priority given to Fair Labor Standards Act cases, and the reluctance of Labor's Office of the Solicitor to pursue court cases under these circumstances, GAO also believes a formal administrative process is necessary to assure fast action while still providing the due-process protections now afforded employers.

Formal hearings, conducted under the Administrative Procedure Act, are presently used to adjudicate penalties in many other regulatory cases. Such hearings would fully protect the employer's due-process rights by providing for an impartial hearing officer (an administrative law judge), a verbatim transcript of the proceedings, and the right to appeal adverse decisions to the courts where cases would be reviewed under the substantial evidence rule. Under the rule, Labor's decision would be set aside if the courts find the decision to be unsupported by substantial evidence. (See pp. 17 and 18.)

DETERRENTS INEFFECTIVE OR NONEXISTENT TO DISCOURAGE WILLFUL MINIMUM WAGE AND OVERTIME VIOLATIONS

The basic provisions of the Fair Labor Standards Act require employers to pay minimum wages and overtime, but there are no civil money penalties for violating the act. Although criminal and liquidated damage penalties exist for willful violations of the act by employers, they have not been used extensively. Labor can also obtain a court order requiring an employer to

comply with the act's minimum wage and overtime provisions. However, even if such orders are later violated, officials in the three regional solicitors' offices in the GAO review advised that monetary penalties for civil contempt generally are insignificant. (See p. 23.)

GAO found that many employers appear to have willfully violated the act and that current enforcement actions have not resulted in penalties that would deter these violations. (See p. 23.)

Many employers repeatedly violate the same sections of the act, and others apparently falsify or conceal records. Both actions strongly indicate that the violations are willful. For example, GAO's nationwide questionnaire, which was completed by Labor's compliance officers for 4,022 cases closed administratively in June 1979, showed that in 244 cases (or 6 percent) violators had apparently falsified or concealed records. In addition, GAO's review of

- about 75 percent of Fair Labor Standards Act cases closed in three Labor regional solicitors' offices in fiscal year 1978 showed that 86 of 230 employers (or 37 percent) had at least one prior violation of the act,
- cases administratively closed during June and July 1979 at six Labor area offices showed that 90 of 433 employers (or about 21 percent) had violated the act at least once before, and
- 65 cases closed during fiscal year 1978, after having been filed in court, showed that regional solicitors alleged that employer violations were willful in 37 (or 57 percent) of the cases.

Compliance officers and regional solicitor officials agreed that willful violations are extensive. Although the act includes both a criminal penalty and a liquidated damage penalty to discourage employers from violating the minimum wage and overtime pay provisions, these sanctions are rarely used. (See pp. 23 to 26.)

Criminal penalties

Criminal penalties may be sought against willful violators of the act with fines up to \$10,000 and, after a second conviction, imprisonment of not more than 6 months. Until recently, solicitors in the three Labor regional offices had not sought criminal penalties against willful violators in at least the last 10 years. Labor officials explained that, overall, criminal sanctions are rarely sought because:

- Department of Justice attorneys do not have a high regard for Fair Labor Standards Act cases and would be hesitant to prosecute them.
- Filing criminal suits reduces Labor's ability to recover employee back wages.

Five of the seven U.S. attorneys GAO interviewed stated they would be willing to criminally prosecute Labor cases. They agreed that prosecuting cases criminally could delay back wage recoveries, but noted that, by coordinating the timing of criminal and civil suits, delays can be minimized.

After GAO brought these discussions to Labor's attention, solicitor officials agreed to explore the possibility of making more use of criminal sanctions. Subsequently, one regional office sent two criminal suits against employers to the U.S. attorney for action. GAO believes Labor should continue to use criminal sanctions after consulting with Justice officials to coordinate litigation strategies. (See pp. 26 to 32.)

Liquidated damage penalties

The Fair Labor Standards Act was amended in 1974 so that Labor could bring action in any court of competent jurisdiction to recover from employers the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. GAO found that several factors limit the usefulness of this sanction and that regional solicitors have seldom sought liquidated damage penalties

against employers who willfully violate minimum wage and overtime compensation requirements. As a result, habitual or flagrant violators receive no harsher treatment than do employers who inadvertently violate the act. (See p. 32.)

Liquidated damages are not an effective way to impose damages because they must be imposed by the courts, usually after a district court trial. Traditionally, however, few civil cases reach trial in the district courts. As a result, penalties are obtained in very few cases, and violators are not being deterred. During the year ended June 30, 1979, only 4.4 percent of the 1,175 Fair Labor Standards Act cases disposed of by the U.S. district courts, nationwide, reached trial where liquidated damages could have been awarded. (See pp. 32 to 38.)

Labor solicitor officials, district court chief judges, and administrative law judges agreed that few Fair Labor Standards Act cases reach district court for trial. Solicitor officials cited the lengthy wait for trial required in some courts, their reluctance to bring cases before a jury, evidence problems due to inadequate records, limited resources to pursue more cases to trial, and the low priority in district courts as the major factors that discourage them from pursuing cases to trial. Regional solicitors also noted that, in the few cases that have reached trial, the damages awarded were disappointingly small. (See pp. 38 to 41.)

To reduce the number and severity of violations of the act, GAO believes civil money penalties assessed by Labor should be substituted for Labor's authority under section 16(c) of the act to seek liquidated damages. Labor should be given the authority to assess a civil money penalty to deter minimum wage and overtime violations. Labor should be able to assess penalties that are sufficient to deter minimum wage and overtime violations. (See pp. 41 and 42.)

GAO believes that the rights of the employers can be protected effectively by giving employers the right to appeal Labor's back wage computations and penalty assessments at formal administrative hearings before administrative law judges. (See p. 42.)

WAGE RECOVERIES HAMPERED BY TIME
AND ADMINISTRATIVE PRACTICES

While penalties are important to deter violations of the minimum wage and overtime provisions, recovering illegally withheld employee wages is also important. To effectively deter violators, Labor's enforcement efforts should eliminate any benefits employers gain from their violations. Therefore, Labor should maximize back wage recoveries, including interest, which helps to make employees whole for the period during which back wages were illegally withheld. (See p. 45.)

Back wages lost due to running of
statute of limitations

The statute of limitations, established by the Portal-to-Portal Pay Act of 1947, restricts an employer's obligation to repay employees back wages to a 2-year period for nonwillful violations and 3 years for willful violations. Parts or all of the statutory periods may expire before an employer waives the right to claim the statute of limitation or before Labor files legal action in a district court. Either action stops the running of the statute (referred to as "tolling of the statute"). The reductions in back wages that employees can recover due to the passage of time are referred to as "back wages lost to the running of the statute." Considerable time usually passed from the date compliance officers started their investigations to the date when regional solicitors filed suit against employers and, as a result, back wages were lost due to the running of the statute of limitations. (See pp. 46 to 49.)

Although Labor may reduce amounts lost due to the running of the statute by filing cases in court earlier, its limited enforcement authority will continue to prevent recovery of full back wages due employees because time will continue to pass between the date a violation is identified and the date the case is filed in court. Current delays in tolling the statute are due to the time taken to

--negotiate cases with the employer at the Labor area office and at the regional solicitor's office and

--analyze the case and file suit in district court.

The most effective time to toll the statute is when Labor determines that a violation occurred and computes the amount of back wages owed. GAO believes Labor should be given the authority to determine that a violation has occurred and to assess the amount of back wages due employees with the tolling of the statute of limitations at that point. GAO also believes that the rights of the employers can be protected effectively by giving employers the right to appeal Labor's assessments at formal administrative hearings before Labor administrative law judges. (See pp. 49 and 50.)

Administrative practices

Several administrative practices followed by Labor also limit the back wages employees eventually recover.

--Labor rarely seeks the third year's back wages (allowed under the act when violations are willful). (See pp. 50 and 51.)

--Labor rarely updates investigations to recover additional back wages that are sometimes illegally withheld by an employer between the date an investigation ends and the date an employer agrees to comply. (See pp. 51 to 55.)

--Labor does not have a program to follow up on employers with a history of violations to assure that proper wages are paid in the future. (See pp. 55 to 57.)

--Labor does not routinely seek interest for employees whose wages have been illegally withheld for long periods of time. (See pp. 57 to 59.)

RECOMMENDATIONS

GAO is recommending to the Congress that it amend the Fair Labor Standards Act to

--give Labor authority to assess civil money penalties large enough to deter recordkeeping violations,

- eliminate the section 16(c) liquidated damage provision of the act and in its place give Labor authority to assess civil money penalties large enough to deter minimum wage and overtime violations, and
- give Labor authority to formally assess a violation of the act as well as the amount of illegally withheld back wages, including interest.

Amendments to the act should also provide for a formal administrative process to adjudicate cases when employers appeal Labor's assessments. In addition, GAO is recommending to the Congress that it amend section 6 of the Portal-to-Portal Pay Act of 1947 so that the statute of limitations tolls when a violation of the Fair Labor Standards Act is formally assessed by Labor.

GAO is recommending to the Secretary of Labor administrative changes needed to strengthen Labor's enforcement program in order to deter employers from violating the Fair Labor Standards Act and to improve Labor's ability to recover the full amount of back wages illegally withheld from employees. (See pp. 18, 42, 60, and 61.

AGENCY COMMENTS

GAO received comments from the Departments of Labor and Justice, the Administrative Conference of the United States, the Minimum Wage Study Commission, the Administrative Office of the United States Courts, and the Chief Judge of the United States Court for the Northern District of Illinois (see apps. III through VIII). Except for Labor's and the Administrative Office of the United States Courts' comments, the agencies' comments endorsed the report and recommendations. The Administrative Office of the United States Courts had no comments on the draft report as a whole but stated that, if GAO's recommendations are implemented, an increase in the Federal courts' workload might be expected. Labor did not comment on GAO's legislative recommendations and either did not concur with or declined to implement recommendations made to the Secretary of Labor. The agencies' comments and GAO's evaluation of them are included on pages 18 to 22, 43, 44, and 61 to 65.)

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ABBREVIATIONS

FLSA	Fair Labor Standards Act
GAO	General Accounting Office